84-1313

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 84-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner,*

v.

RONALD L. COSBY, *et al.*,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 15, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Whether in a railroad merger the employees of a motor carrier subsidiary are "railroad employees" entitled to mandatory labor protective conditions?

2. Whether the court of appeals exceeded its jurisdiction in determining causation issues subject to a mandatory arbitration requirement?

3. Whether the court of appeals, in reversing the Interstate Commerce Commission's refusal to reopen the proceeding, erred in directing the Commission to grant particular relief?

## PARTIES TO THE PROCEEDINGS BELOW AND SUPREME COURT RULE 28.1 STATEMENT

In addition to the parties named in the caption, 111 individuals appeared before the Interstate Commerce Commission and the Eighth Circuit Court of Appeals as petitioners; * the Interstate Commerce Commission and the United States of America appeared before the Eighth Circuit Court of Appeals as respondents.

Petitioner's parent company is Burlington Northern Inc. The partially owned subsidiaries and affiliates of petitioner and petitioner's parent are:

Burlington Northern Railroad Company:

The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and
North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railroad Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company

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* The 111 individuals are listed in the Appendix at 47a.

The El Paso Company:

- El Paso Development Co.:
  - Lake Country
  - Windjammer, Inc.:
    - Adams Canyon Ranch
    - Santa Paula Farms
- El Paso Natural Gas Co.:
  - El Paso Europe-Afrique, S.A.
  - El Paso Hydrocarbons Co.:
    - Minera San Pedro Corralitos, S.A.
- Milestone Petroleum Inc.:
  - Butte Pipe Line Company
  - Portal Pipe Line Company
- New Mexico and Arizona Land Company:
  - NZ Development Corp.
  - NZ Properties, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDINGS BELOW | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTIONAL STATEMENT | 1 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. THE COURT OF APPEALS' HOLDING THAT THE EMPLOYEES OF A RAILROAD'S MOTOR CARRIER SUBSIDIARY CONSTITUTE RAILROAD EMPLOYEES WITHIN THE MEANING OF 49 U.S.C. § 5(2)(f) IS A RADICAL DEPARTURE FROM PAST REGULATORY PRACTICES AND SHOULD BE REVIEWED BY THIS COURT | 7 |
| A. In the Forty-five Years Since Congress Enacted Section 5(2)(f), the Commission Has Consistently Denied Mandatory Labor Protection to Employees of a Non-Railroad Involved in a Rail Merger | 8 |
| B. The Court of Appeals' Holding Has Broad Implications for the Transportation Industry as a Whole | 14 |
| II. THE COURT OF APPEALS' DETERMINATION THAT THESE CLAIMANTS WERE AFFECTED BY THE MERGER WAS IN EXCESS OF ITS JURISDICTION | 16 |
| III. THE COURT OF APPEALS' ALTERNATIVE HOLDING CONSTITUTES AN IMPERMISSIBLE EXERCISE OF AN ADMINISTRATIVE FUNCTION | 20 |
| CONCLUSION | 23 |


[THE APPENDIX IS SEPARATELY BOUND]

## TABLE OF AUTHORITIES

CASES — Page

*Acquisition of Motor Carriers by Railroads*, —— I.C.C. —— (July 20, 1984), *appeal pending sub nom. American Trucking Associations, Inc. v. I.C.C.*, No. 84-7545 (9th Cir. filed Aug. 20, 1984) ..... 16
*American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966) ..... 13
*Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), *aff'd, American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. (1984) ..... 16
*Arnold v. Louisville & Nashville Railroad*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom. Batts v. Louisville & Nashville Railroad*, 316 F.2d 22 (6th Cir. 1963) ..... 19, 20
*Atchison, Topeka & Santa Fe Railway v. United States*, 617 F.2d 485 (7th Cir. 1980) ..... 11
*Baggett Transportation Co. — Purchase — Hunt Freight Lines, Inc.*, 75 M.C.C. 147 (1958), *aff'd*, 87 M.C.C. 235 (1961) ..... 13
*Baggett Transportation Co. — Purchase — Hunt Freight Lines, Inc.*, 87 M.C.C. 235 (1961) ..... 13
*Baltimore Steam Packet Co. Acquisition, Control, Etc.*, 244 I.C.C. 583 (1941) ..... 9
*Batts v. Louisville & Nashville Railroad*, 316 F.2d 22 (6th Cir. 1963) ..... 18, 19
*Bell v. Western Maryland Railway*, 366 I.C.C. 64 (1981) ..... 18, 19
*Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281 (1974) ..... 21
*Burlington Northern, Inc.—Control & Merger— St. Louis-San Francisco Railway*, 360 I.C.C. 788, *aff'd sub nom. Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981) ..... 4, 5
*Cass v. United States*, 417 U.S. 72 (1974) ..... 11

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Chesapeake & Ohio Railway v. Ford*, 590 F.2d 557 (4th Cir. 1979) | 18, 19 |
| *Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982) | 15 |
| *City of Greenwood v. Peacock*, 384 U.S. 808 (1966) | 11 |
| *CSX Corp. — Control — American Commercial Lines, Inc.*, —— I.C.C. ——, Finance Docket No. 30300, (served Sept. 7, 1984), *appeal pending sub nom. Crounse Corp. v. I.C.C.*, Nos. 84-3743 - 84-3753 (6th Cir. filed Sept. 10, 1984) | 10, 16 |
| *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981) | 14 |
| *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) | 22 |
| *Federal Barge Lines, Inc., Purchase*, 285 I.C.C. 439 (1953) | 10 |
| *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952) | 21 |
| *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) | 20 |
| *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940) | 22 |
| *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115 (1962) | 22 |
| *Held v. National Railroad Passenger Corp.*, 101 F.R.D. 420 (D.D.C. 1984) | 19 |
| *ICC v. City of Jersey City*, 322 U.S. 503 (1944) | 21 |
| *ICC v. Railway Labor Executives Association*, 315 U.S. 373 (1942) | 23 |
| *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) | 22 |
| *Interstate Motor Freight System—Purchase—Great Lakes Express Co.*, 122 M.C.C. 232 (1975) | 13 |
| *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962 (1977) | 19 |
| *McLaughlin v. Penn Central Transportation Co.*, 384 F. Supp. 179 (S.D.N.Y. 1974) | 18, 19 |

TABLE OF AUTHORITIES—Continued

Page

*Midwest Buslines, Inc.—Purchase—American Buslines, Inc.*, 97 M.C.C. 426 (1964), *aff'd, American Buslines, I[illegible] v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966) ..... 13

*Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981) ..... 4

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) ..... 20

*Nemitz v. Norfolk & Western Railway*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971) ..... 18

*New Orleans & Northeastern v. Bozeman*, 312 F.2d 264 (5th Cir. 1963) ..... 18

*New York Dock Railway v. Pennsylvania Railroad*, 62 F.2d 1010 (3d Cir. 1933) ..... 13

*New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) ..... 2

*New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979) ..... *passim*

*NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974) ..... 22

*Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, Finance Docket No. 30500 (I.C.C. filed Aug. 16, 1984) ..... 15

*Northern Lines Merger Cases*, 396 U.S. 491 (1970) ..... 21

*Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 177 (1944) ..... 18

*O'Mara v. Erie Lackawanna Railroad*, 407 F.2d 674 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970) ..... 19

## TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, 97 M.C.C. 568 (1964), *aff'd sub nom. American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966) | 13 |
| *Parsons v. Norfolk & Western Railway*, 442 F.2d 1075 (4th Cir. 1971) | 19 |
| *Pennsylvania Railroad—Merger—New York Central Railroad*, 327 I.C.C. 475 (1966), *modified*, 331 I.C.C. 643 (1967), *aff'd sub nom. Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486 (1968) | 9, 10 |
| *Pennsylvania Railroad—Merger—New York Central Railroad*, 331 I.C.C. 643 (1967) | 9, 10 |
| *Pennsylvania Railroad—Merger—New York Central Railroad*, 347 I.C.C. 536 (1974) | 10 |
| *Railway Labor Association v. United States*, 339 U.S. 142 (1950) | 2 |
| *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co.*, Finance Docket No. 30400 (I.C.C. filed Mar. 23, 1984) | 15 |
| *Short Lines, Inc.—Purchase—New England Transportation Co.*, 75 M.C.C. 33 (1958) | 13 |
| *Sorensen v. Chicago & North Western Transportation Co.*, 627 F.2d 136 (8th Cir. 1980) | 19 |
| *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800 (1976) | 22 |
| *Southern Railway—Control—Central of Georgia Railway*, 317 I.C.C. 557 (1962), *modified*, 317 I.C.C. 729 (1963) | 18 |
| *Swartz v. Norfolk & Western Railway*, 589 F. Supp. 743 (E.D. Mo. 1984) | 18 |
| *Trailways of New England, Inc.—Purchase—Boston & Maine Transportation*, 80 M.C.C. 697 (1959) | 13 |
| *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946) | 21 |

TABLE OF AUTHORITIES—Continued

Page

*United States v. Saskatchewan Minerals*, 385 U.S. 94 (1966) ..... 22
*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) ..... 20
*United Transportation Union v. Norfolk & Western Railway*, 332 F. Supp. 1170 (N.D. Ohio 1971) ..... 19
*Walters v. Roadway Express, Inc.*, 557 F.2d 521 (5th Cir. 1977) ..... 13
*Walsh v. United States*, 723 F.2d 570 (7th Cir. 1983) ..... 18, 19
*Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984) ..... 19

STATUTES

28 U.S.C. § 1254(1) (1982) ..... 2
Rail Passenger Service Act, 45 U.S.C. § 565 ..... 3
49 U.S.C. § 1(3)(a) (1976) ..... 11
Interstate Commerce Act, § 5(2)(c), 49 U.S.C. § 5(2)(c) (1976) ..... *passim*
Interstate Commerce Act, § 5(2)(f), 49 U.S.C. § 5(2)(f) (1976) ..... *passim*
49 U.S.C. § 5(10) (1976) ..... 6
49 U.S.C. § 303(a)(16) (1976) ..... 11
49 U.S.C. § 11341(a) (1982) ..... 22
49 U.S.C. § 11344(b)(2)-(c) (1982) ..... 2
49 U.S.C. § 11344(b)(2)(D) (1982) ..... 22
49 U.S.C. § 11344(c) (1982) ..... 2
49 U.S.C. § 11347 (1982) ..... 2, 6
49 U.S.C. § 11351 (1982) ..... 6
Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62 (1976) ..... 3
Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978) ..... 11
Motor Carrier Act, Pub. L. No. 96-296, 94 Stat. 793 (1980) ..... 4, 15, 16
Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980) ..... 16

TABLE OF AUTHORITIES—Continued

CONGRESSIONAL MATERIALS — Page

*Omnibus Transportation Bill: Hearings on H.R. 2531 & H.R. 4862 Before the House Comm. on Interstate & Foreign Commerce*, 76th Cong., 1st Sess. (1939) ..... 11

S. Rep. No. 433, 76th Cong., 1st Sess. (1939) ..... 8

PUBLICATIONS

Association of American Railroads, Railroad Ten-Year Trends, Vol. 1, Table I-2 (1984) ..... 14

MISCELLANEOUS

Letter from Chairman of the Legislative Committee of the Interstate Commerce Commission, 76th Cong., 2d Sess., Transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House of Representatives a Report Relative to Omnibus Transportation Legislation, S. 2009, As Passed by Both Houses of Congress at 6[illegible] (Jan. 29, 1940) ..... 12

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, Burlington Northern Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 22, 1984.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 741 F.2d 1077 (8th Cir. 1984), and appears in the Appendix at 1a to 14a. The opinion of the Interstate Commerce Commission, which has not been reported, appears in the Appendix at 15a to 21a.

### JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 22, 1984. A timely peti-

tion for rehearing and suggestion for rehearing *en banc* was denied on October 18, 1984. A request for extension of the time allowed for the filing of this petition was filed on December 17, 1984. On December 20, 1984, the deadline for filing of this petition was extended to February 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

## STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), is set forth in the Appendix at 26a. That section has been recodified at 49 U.S.C. § 11347 (1982). Section 11347 is set forth in the Appendix at 28a. Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), is set forth in the Appendix at 26a. That section has been recodified, in pertinent part, at 49 U.S.C. § 11344(b)(2)-(c) (1982). Section 11344(b)(2)-(c) is set forth in the Appendix at 27a to 28a.

## STATEMENT OF THE CASE

Since enactment of the Transportation Act of 1940 the Interstate Commerce Commission has been required, in approving a railroad merger, to impose conditions for the protection of the railroad employees affected by the merger.[1] The level of benefits afforded by the protective conditions evolved through a series of ICC decisions,[2] and culminated in 1976 with a congressional directive that

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[1] The concept of employee protective conditions had originated in 1936 in the Washington Job Protection Agreement, a voluntary arrangement between the major railroads and the principal railroad labor unions designed to facilitate railroad mergers without excessive labor strife. *See Railway Labor Association v. United States*, 339 U.S. 142, 146-48 (1950).

[2] The history of the development of employee protective conditions is described in detail in *Railway Labor Association*, 339 U.S. at 146-54; *New York Dock Railway v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979).

in the future such conditions must be "no less protective of the interests of employees than those heretofore imposed." [3] In compliance with that statutory mandate, the Commission formulated the so-called "*New York Dock* conditions," [4] which provide, *inter alia*, for payment of the employee's full salary plus general wage increases and fringe benefits for six years after dismissal or displacement as a result of the merger. App. at 29a, 32a to 35a. The *New York Dock* conditions expressly provide that any dispute as to interpretation or application of the conditions is subject to binding arbitration. App. at 36a to 37a.

This case concerns the protective conditions imposed in the wake of the merger of petitioner, the Burlington Northern Railroad Company ("BN"), with the St. Louis-San Francisco Railway Company ("Frisco"). In the year-long hearings that preceded that merger, several organizations representing employees of BN, Frisco and certain competing railroads sought protection for their members against the economies created by the merger. In its 1980 order approving the merger, the Commission provided *New York Dock* conditions for "railroad employees" of the merged railroad whose jobs were affected by the merger but denied protection to employees of the compet-

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[3] Pub. L. No. 94-210, § 402(a), 90 Stat. 31, 62 (1976), amending 49 U.S.C. § 5(2)(f). The amendment required that the level of protection be no less favorable than the conditions previously imposed by the ICC pursuant to § 5(2)(f) and those imposed by the Secretary of Transportation pursuant to the Rail Passenger Service Act, 45 U.S.C. § 565.

[4] The name is derived from the proceeding in which these conditions were first formulated and imposed. *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979). These conditions are fully set forth in the Appendix at 29a to 42a.

ing railroads.[5] The Commission's decision was upheld by the Fifth Circuit and this Court denied certiorari.[6]

At the time of the merger, BN and Frisco each had a motor carrier subsidiary (BN Transport and Frisco Transportation Company). However, no organization representing the motor carrier employees intervened in the merger proceeding to seek protection. Shortly thereafter, a dramatic shift in the operating results of the two motor carriers occurred, with BN Transport ("BNT") achieving a turnaround from a $3.6 million loss in 1980 to a $900,000 profit in 1981, while Frisco Transportation Company ("FTC") suffered a decline from a $150,000 profit to a $750,000 loss during the same period.[7] Faced with this turn of events, and the fact that BNT (but not FTC) had just obtained 48-state unrestricted general commodities authority under the deregulatory Motor Carrier Act of 1980,[8] BN decided to terminate FTC's operations. As a result, most of the FTC employees were dismissed.

This case arose when respondents, a group of former union and management employees of FTC, filed a petition with the ICC asking that it reopen its earlier decision approving the BN-Frisco merger in order to "enforce" on their behalf the *New York Dock* protective conditions that had been ordered for the benefit of "railroad employees." After full consideration of the petitions and BN's reply, the Commission issued an order denying the petition.

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[5] *Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Railway*, 360 I.C.C. 788, 1182 (1980) [hereinafter cited as *Merger Order*].

[6] *Missouri-Kansas-Texas Railroad v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

[7] *See* Reply of Burlington Northern Railroad Company to Petition to Reopen, Finance Docket No. 28583 (Sub-No. 1F) at 11 (citing 1981 Annual Reports to the ICC).

[8] Pub. L. No. 96-296, 94 Stat. 793 (1980).

The Commission first held that the claimants, as employees of a motor carrier subsidiary and not of the railroad itself, were not covered by the *New York Dock* conditions imposed in the 1980 Merger Order since those conditions were limited by their terms to "railroad employees." [9] This limitation was, the Commission noted, fully consistent with the statute, which requires the Commission "to impose labor protection conditions *only* on the merging railroads, not motor carriers or other entities that might be involved." App. at 17a.

The Commission further concluded that, although it has the discretion to impose labor protective conditions for the benefit of non-rail employees, it had not done so in this case. Indeed, claimants "did not request such protection" at the time of the merger, App. at 17a, and did not even appear in the merger proceeding. App. at 20a.

Finally, the Commission considered whether the merger proceeding should now be reopened and a supplementary order issued imposing protective conditions for the benefit of claimants. The Commission concluded that claimants had failed to demonstrate that "there was any misrepresentation on the part of BN during the merger proceeding that led [the ICC] to refrain from imposing conditions" to protect employees of the motor carrier subsidiaries. App. at 19a. The Commission accepted BN's explanation that the dismissals "were not contemplated by BN at the time of the merger, but resulted

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[9] The ICC's 1980 Merger Order had provided that:

> Railroad employees of the merged system and subsidiaries shall be entitled to the standard level of protection * unless an agreement is entered prior to merger, in which case protection shall be at the agreed level.

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* *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

*Merger Order*, 360 I.C.C. at 1182.

from changed business circumstances." App. at 19a. Thus the Commission concluded that the claimants had failed to show "good cause," as required by statute,[10] for the issuance of a supplemental order retroactively imposing employee protective conditions for their benefit.

On appeal, the Court of Appeals for the Eighth Circuit reversed. The Eighth Circuit concluded that the term "railroad employees" in section 5(2)(f)[11] encompasses the employees of any subsidiary whose operation "is a part of one of the merging railroad's overall transportation system." App. at 7a. The court reasoned that the motor carrier, which performed services auxiliary to and supplemental of rail services, was "intimately tied to the railroad's main transportation function," App. at 6a, and that its employees must thus be regarded as "railroad employees" entitled to the *New York Dock* conditions.

The Eighth Circuit then went on to address the issue of whether these particular claimants were "affected" by the merger within the meaning of the statute. Ignoring the mandatory arbitration clause in the *New York Dock* conditions, *see* App. at 36a to 37a, the court ruled that "[t]here is no doubt that the FTC employees were affected, i.e., 'touched significantly,' by the *BN-Frisco Merger*." App. at 3a.

Finally, the Eighth Circuit concluded that even if the employees of the motor carrier subsidiary were not "railroad employees" under section 5(2)(f), the Commission nevertheless abused its discretion in declining to grant them the same level of protection as the railroad employees. Pointing to fragmentary excerpts from the massive

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[10] Former § 5(9) of the Interstate Commerce Act, 49 U.S.C. § 5(10) (1976) (current version at 49 U.S.C. § 11351 (1982)).

[11] Section 5(2)(f) was recodified at 49 U.S.C. § 11347 in 1978. Since the majority of Commission decisions interpreting this section occurred prior to the recodification, this Petition, for consistency, refers to the statute as § 5(2)(f).

merger record,[12] the court concluded that particular statements of BN and Frisco officials constituted "representations" that the complaining employees would not be adversely affected, that their failure to intervene in the proceeding to seek protective conditions was thereby excused, and that they were now as a matter of law entitled to *New York Dock* conditions. App. at 7a to 14a.[13]

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' HOLDING THAT THE EMPLOYEES OF A RAILROAD'S MOTOR CARRIER SUBSIDIARY CONSTITUTE RAILROAD EMPLOYEES WITHIN THE MEANING OF 49 U.S.C. § 5(2)(f) IS A RADICAL DEPARTURE FROM PAST REGULATORY PRACTICES AND SHOULD BE REVIEWED BY THIS COURT

The court's holding that employees of a railroad's motor carrier subsidiary constitute "railroad employees" entitled to mandatory employee protection under 49 U.S.C. § 5(2)(f) is contrary to the clear language of the statute and overturns four decades of consistent construction and application by the ICC. The Commission's longstanding interpretation has been that section 5(2)(f) applies only to employees of the railroad itself, and that for employees of any non-railroads involved in the merger—including a motor carrier subsidiary—protec-

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[12] Although the merger record consisted of over 8,000 pages, the Commission's certified index to the appellate record, App. at 46a, reveals that only those few excerpts from the record singled out by complainants were transmitted to the court.

[13] The mandate of the court of appeals was not stayed and accordingly, on remand, the Commission issued an order reopening the proceeding, imposing *New York Dock* conditions for the complaining employees and referring the parties to negotiation or arbitration. Thereafter, the claimants filed a petition for reconsideration, requesting that the determination of the amount of benefits due each employee be assigned to an Administrative Law Judge. The Commission has not yet ruled on that petition.

tion is discretionary. While the Commission consistently imposes *New York Dock* conditions for the protection of railroad employees, in no instance has it ever granted motor carrier employees any greater protection than three months' severance pay.

The court's holding has broad implications for the transportation industry as a whole. Unions representing motor carrier employees have already seized upon the court's holding to urge, in virtually every pending railroad merger proceeding, that the Commission is required to impose *New York Dock* conditions to protect employees of motor carriers involved in the merger. Such an unwarranted expansion of the reach of a unique, narrowly drawn statute would impose unwarranted economic burdens on railroads seeking to improve their financial condition and economic efficiency through consolidations.

### A. In the Forty-five Years Since Congress Enacted Section 5(2)(f), the Commission Has Consistently Denied Mandatory Labor Protection to Employees of a Non-Railroad Involved in a Rail Merger

Congress first enacted mandatory employee protection for railroad employees affected by a merger or consolidation as part of the Transportation Act of 1940.[14] That Act provided in relevant part:

> As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require

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[14] That Depression-era statute was enacted in response to a financial crisis in the railroad industry: as of 1939, one-third of all railroad mileage was in bankruptcy, another third was on the brink, and thousands of railroad workers were unemployed. *See* S. Rep. No. 433, 76th Cong., 1st Sess. 1 (1939). As part of an effort to alleviate that crisis, Congress in § 7 of the Act sought to facilitate consolidation of weaker rail lines and mergers with solvent lines, and at the same time provide continuation of salary for laid-off workers during the depths of the Depression.

> a fair and equitable arrangement to protect the interests of the railroad employees affected.

49 U.S.C. § 5(2)(f) (1976).

The issue of whether "railroad employees" included employees of non-rail companies involved, as subsidiaries or otherwise, in a railroad consolidation arose just one year after enactment of section 5(2)(f). The Commission in *Baltimore Steam Packet Co. Acquisition, Control, Etc.*, 244 I.C.C. 583 (1941), explicitly held that the term "railroad employees" had a limited meaning and did not encompass individuals employed by a non-railroad company involved in a railroad merger, even if that company was engaged in the performance of a closely related transportation service. There, the railroads sought to acquire control of a water carrier for the purpose of providing intermodal rail-water transportation. Although it was conceded that some of the water carrier's employees would lose their jobs as a result of the transaction, the Commission declined to impose protective conditions for their benefit. The Commission reasoned that "[u]nder the maxim of law that *inclusio unius est exclusio alterius*, the mandatory provisions of subparagraph (f) apply only to transactions involving carriers by railroad, and require protection of railroad employees only . . . ." *Id.* at 604.

Since that time, in every railroad transaction in which the issue of protection for employees of a non-rail party or subsidiary was raised, the Commission has consistently held that such employees were not "railroad employees" within the meaning of the statute. For example, in a case involving the Penn Central merger,[15] the Commis-

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[15] The Penn Central merger had been approved by the ICC in *Pennsylvania Railroad—Merger—New York Central Railroad*, 327 I.C.C. 475 (1966), *modified*, 331 I.C.C. 643 (1967), *aff'd sub nom. Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486 (1968). In that case each of the merging railroads—the Pennsylvania, the New York Central and the New Haven—owned one or more motor

sion held that the mandatory protection provisions of section 5(2)(f) did not apply to employees of two subsidiaries of the Penn Central—a rail refrigerator car service company and a warehouse company—whose functions were closely linked to the railroad's transportation system. *See Pennsylvania Railroad—Merger—New York Central Railroad*, 347 I.C.C. 536, 546-50 (1974). More recently, in approving the acquisition of a large water carrier, American Commercial Barge Line Co., by CSX, a railroad holding company, for the purpose of offering an integrated single-system rail-water transportation service,[16] the Commission denied employee protection for the water carrier employees.[17] *Accord Federal Barge Lines, Inc., Purchase*, 285 I.C.C. 439, 447 (19[illegible]).

Just as the early cases under the Act had distinguished between railroad employees and employees of a water carrier subsidiary, the Commission, driven by the language of the statute, has drawn a clear distinction between railroad employees and motor carrier employees. Section 5(2)(f) by its terms applied only to "railroad employees," and nowhere in the language of the statute

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carrier subsidiaries. 327 I.C.C. at 587, 592; 331 I.C.C. at 725. Yet it was never even suggested that employees of any of the motor carrier subsidiaries should receive protection pursuant to § 5(2)(f). In fact, even when the issue of protection for subsidiaries arose, no one suggested that the motor carrier employees were entitled to protection.

[16] *CSX Corp.—Control—American Commercial Lines, Inc.*, —— I.C.C. ——, Finance Docket No. 30300, slip op. at 5 (served Sept. 7, 1984), *appeal pending sub nom. Crounse Corp. v. ICC*, Nos. 84-3743 - 84-3753 (6th Cir. filed Sept. 10, 1984).

[17] *CSX Corp.*, slip op. at 63. CSX Corporation controls the Chesapeake and Ohio Railway Co. and its rail subsidiaries, the Seaboard System Railroad, Inc. and its rail subsidiaries, and the Richmond, Fredericksburg, and Potomac Railroad Company. CSX Corporation also controls two motor carrier subsidiaries, Chessie Motor Express, Inc. and Seacoast Transportation Co. *CSX Corp.*, slip op. at 4 n.5 & 5 n.6.

was there any suggestion that "railroad employees" [18] could include the employees of a motor carrier subsidiary, even though Congress was aware that many railroads owned motor carrier companies.[19] Former section 1(3)(a) of the Interstate Commerce Act provided a detailed definition of the term "railroad," but did not mention anything connected with motor carriage.[20]

At the same time that section 5(2)(f) of the 1940 Act prescribed mandatory protection for "railroad employees," a separate section, 5(2)(c), authorized discretionary pro-

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[18] While the recodification in 1978 deleted the term "railroad," see App. at 28a, Congress decreed that this change in language "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978). The court below inexplicably found the deletion of "railroad" to be significant, but ultimately decided not to rely on this change in language. App. at 5a to 6a. To the extent that the panel opinion accorded any substantive weight to the recodification, it was clearly in error. *See Cass v. United States*, 417 U.S. 72, 82 (1974); *City of Greenwood v. Peacock*, 384 U.S. 808, 815-16 (1966); *Atchison, Topeka & Santa Fe Railway v. United States*, 617 F.2d 485, 490 (7th Cir. 1980).

[19] *Omnibus Transportation Bill: Hearings on H.R. 2531 & H.R. 4862 Before the House Comm. on Interstate & Foreign Commerce*, 76th Cong., 1st Sess. 225-26 (1939) (testimony of George M. Harrison, Chairman, Railway Labor Executives' Association).

[20] The term "railroad" . . . shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transaportation or delivery of any such property.

49 U.S.C. § 1(3)(a) (1976). The Act separately defined "motor carrier" as a carrier by motor vehicle. 49 U.S.C. § 303(a)(16) (1976).

tection for motor carrier employees.[21] This distinction was created by the Conference Committee in response to a letter from Commissioner Eastman, Chairman of the Interstate Commerce Commission's Legislative Committee, who recommended that protection of motor carrier employees be made "discretionary rather than mandatory." [22]

As a result of this statutory distinction, an entirely different approach evolved with respect to protective conditions for employees of motor carriers than for railroad employees involved in a merger. In exercising its discretion under section 5(2)(c), the Commission has consistently refused to impose the same level of protection for motor carrier employees as is required for railroad employees, explaining:

> Had Congress intended to accord motor carrier employees the same protection granted railroad employees by section 5(2)(f), it would not have made the provisions of that section mandatory, while, at the same time, writing the discretionary provisions contained in section 5(2)(c). It is clear that section 5(2)(f), consisting of only three sentences, is limited to railroad employees, and, in this respect, contains no ambiguities. Any attempt on our part to interpret it as embracing motor carrier employees would be a usurpation of the congressional function of legislation.

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[21] The original language of the provision that became § 5(2)(f) was not expressly limited to "railroad" employees. At the same time that the Conference Committee added the discretionary provision for motor carrier employees, it inserted the word "railroad" in § 5(2)(f) limiting its scope to railroad employees.

[22] Letter from Chairman of the Legislative Committee of the Interstate Commerce Commission, 76th Cong., 2d Sess., Transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the House of Representatives a Report Relative to Omnibus Transportation Legislation, S. 2009, As Passed by Both Houses of Congress at 67 (Jan. 29, 1940).

*Midwest Buslines, Inc.—Purchase—American Buslines, Inc.*, 97 M.C.C. 426, 439 (1964), *aff'd, American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966); *accord Overnite Transportation Co.—Purchase—Rutherford Freight Lines, Inc.*, 97 M.C.C. 568, 578 (1964), *aff'd sub nom. American Buslines, Inc. v. United States*, 253 F. Supp. 481 (D.D.C.), *aff'd per curiam sub nom. Amalgamated Transit Union, AFL-CIO v. United States*, 385 U.S. 38 (1966).[23] As to motor carrier employees, the Commission has awarded a substantially lesser level of protection than for railroad employees, ranging from no protection at all to three months' severance pay.[24] The Commission's consistent refusal to extend to motor carrier employees the level of protection mandated by statute for railroad employees has been upheld by the courts.[25]

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[23] The Commission, in addition to discussing the statutory language and legislative history of § 5(2)(f), also focused on the differences between the motor carrier and railroad industries, noting that the skills of motor carrier employees are more readily transferable in the expanding motor carrier industry than are the more limited and unique skills of railroad employees. *Overnite Transportation Co.*, 97 M.C.C. at 579.

[24] *E.g., Interstate Motor Freight System—Purchase—Great Lakes Express Co.*, 122 M.C.C. 232, 238 (1975) (six weeks' severance pay); *Midwest Buslines, Inc.*, 97 M.C.C. at 442 (payment of moving expenses); *Baggett Transportation Co.—Purchase—Hunt Freight Lines, Inc.*, 87 M.C.C. 235, 236 (1961); *Trailways of New England, Inc.—Purchase—Boston & Maine Transportation*, 80 M.C.C. 697, 706-07 (1959) (no conditions imposed; jurisdiction retained for three years to impose such conditions as may be necessary); *Baggett Transportation Co.*, 75 M.C.C. 147, 152 (1958), *aff'd*, 87 M.C.C. 235 (1961); *Short Lines, Inc.—Purchase—New England Transportation Co.*, 75 M.C.C. 33, 38 (1958).

[25] *American Buslines, Inc.*, 253 F. Supp. at 483; *accord Walters v. Roadway Express, Inc.*, 557 F.2d 521, 523 n.2 (5th Cir. 1977); *see also New York Dock Railway v. Pennsylvania Railroad*, 62 F.2d 1010, 1014 (3d Cir. 1933) (operation by railroad of trucks from its terminals to deliver and receive freight is not a "railroad").

Thus, since passage of the Transportation Act of 1940, the Commission has consistently held that employees of a non-rail subsidiary of a merging railroad are not "railroad employees" within the meaning of section 5(2)(f) and are not entitled to protection under the mandate of that section. Moreover, in no case has the Commission ever awarded employees of a motor carrier—whether an independent motor carrier or a subsidiary of a railroad—a level of protection as extensive as that mandated by section 5(2)(f).

In the decision below, the court of appeals thus has reversed four decades of consistent interpretation and implementation of the statute by the Commission. In so doing, the court has wholly disregarded the principle that the interpretation of a statute by the agency charged with its administration is entitled to special deference when it originated at the time of enactment and has remained consistent over a long period of time. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Because the Eighth Circuit's radical departure from well settled law jeopardizes the balance of interests that has been developed by the Commission in the past forty-five years, it deserves plenary review by this Court.

### B. The Court of Appeals' Holding Has Broad Implications for the Transportation Industry as a Whole

The court's holding that the employees of a railroad's motor carrier subsidiary are "railroad employees" has broad implications for past, present, and future transactions in the transportation industry. In recent years, the railroad industry has been marked by a wave of mergers.[26] Many of those railroads owned motor carrier subsidiaries, just as BN and Frisco did. In each decision authorizing a merger the Commission, as required by section 5(2)(f), imposed labor protective conditions

[26] In the past 28 years, all but six of the 28 Class I railroads have consummated one or more unifications with other railroads. Association of American Railroads, Railroad Ten-Year Trends, Vol. 1, Table I-2 (1984).

for the "railroad employees." The court of appeals' holding raises significant questions as to the scope of the employee protective conditions imposed in those consummated transactions. Under the court's reasoning, those railroads are all now in jeopardy of facing demands by employees of motor carrier subsidiaries for payment of *New York Dock* benefits.

In addition, the court's decision has already spawned extensive litigation before the Commission. Unions representing motor carrier employees are currently appearing in virtually every pending consolidation proceeding to argue that the opinion below mandates the imposition of *New York Dock* conditions to protect the employees of carriers involved in the transaction. *E.g., Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co.*, Finance Docket No. 30400 (I.C.C. filed Mar. 23, 1984); *Chicago, Milwaukee, St. Paul & Pacific Railroad—Reorganization—Acquisition by Grand Trunk Corp.*, Finance Docket No. 28640 (Sub-No. 9) (I.C.C. filed Aug. 5, 1982); *Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, Finance Docket No. 30500 (I.C.C. filed Aug. 16, 1984). The unions urge that the six-year mandatory protection of *New York Dock* is required regardless of the type of service performed by the motor carrier subsidiary or whether it has any relation whatsoever with the railroad's transportation service. The reason is apparent—*New York Dock* conditions, which in effect require a railroad to keep employees on its payroll for six years after they are displaced as a result of the merger, are far more desirable to a union than the three months' severance pay (or less) they would otherwise be awarded by the ICC.

The court's holding threatens to have an even more significant impact in future transactions. Since 1980, the transportation industry has undergone dramatic and rapid changes as a result of the deregulatory Motor Car-

rier Act of 1980[27] and the Staggers Rail Act of 1980.[28] As barriers to railroad acquisition of motor carriers and water carriers are eliminated,[29] mergers between rail and non-rail carriers are likely to become more commonplace. By raising the specter of imposition of *New York Dock* conditions for employees of motor carriers involved in consolidations with railroads, the decision below undercuts such efforts to make the transportation industry more efficient and responsive to the nation's changing needs.

## II. THE COURT OF APPEALS' DETERMINATION THAT THESE CLAIMANTS WERE AFFECTED BY THE MERGER WAS IN EXCESS OF ITS JURISDICTION

The court below decided not only that the former employees of Frisco's motor carrier subsidiary were "railroad employees" within the coverage of section 5(2)(f), but also that they were "affected" by the merger and hence entitled to mandatory six-year protection under that provision. Thus, at the same time that the court below vastly extended the scope of *New York Dock* to include non-railroad employees, it misapprehended the most fundamental principle guiding implementation of the *New*

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[27] Pub. L. No. 96-296, 94 Stat. 793 (1980).

[28] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[29] The Commission has abolished the requirement that a railroad must demonstrate "special circumstances" in order to obtain unrestricted motor carrier operating authority by licensing or acquisition, thus greatly facilitating the establishment by railroads of motor carrier subsidiaries. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), *aff'd, American Trucking Associations, Inc. v. ICC*, 722 F.2d 1243 (5th Cir.), *cert. denied*, 105 S. Ct. 324 (1984); *Acquisition of Motor Carriers by Railroads*, —— I.C.C. —— (July 20, 1984), *appeal pending sub nom. American Trucking Associations, Inc. v. ICC*, No. 84-7545 (9th Cir. filed Aug. 20, 1984). The Commission has also adopted a new analytical approach of competitive impacts which eliminates barriers to railroad acquisitions of water carriers. *See* discussion of *CSX Corp., supra* p. 10.

*York Dock* conditions—that all disputes between the employer and employees as to application of the conditions will be submitted to arbitration. In deciding in a single stroke the intensely factual causation issue, the court below exceeded its own jurisdiction, ignored the basic structural concept of *New York Dock*, and undermined federal policy favoring arbitral rather than judicial resolution of labor disputes.

Under section 5(2)(f), an individual seeking protection must demonstrate both that he was an "employee" covered by that provision and that his employment status was "affected" by the merger. Here, claimants' general contention that they were "affected" by the shutdown of FTC's operations had been met by BN's response that the shutdown of FTC was not caused by the merger but by supervening regulatory developments and an unexpected downturn in FTC's profitability.[30] The individual circumstances leading to the dismissal of particular employees were never considered at all. Nevertheless, the court below peremptorily resolved the causation issue in a single paragraph, concluding that the FTC employees were necessarily "affected" by the merger because Burlington Northern would not have been able to phase out one of its motor carrier subsidiaries had it not acquired two subsidiaries by reason of the merger.[31]

In deciding whether the employees involved here were "affected" by the merger, the court below exceeded its own jurisdiction. Section 11 of the *New York Dock* conditions provides that "[i]n the event the railroad and its employees or their authorized representatives cannot set-

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[30] The Commission recognized that BN had a substantial argument on this point. *Burlington Northern, Inc.—Control & Merger —St. Louis-San Francisco Railway*, Finance Docket No. 28583 (Sub-No. 1), slip op. at 2 (Nov. 21, 1983) [hereinafter cited as *Reopening Denial*], App. at 16a to 17a.

[31] In fact, BN has subsequently sold BNT, the other motor carrier subsidiary held by it at the time of the merger.

tle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix . . . it may be referred by either party to an arbitration committee." *New York Dock Railway*, 360 I.C.C. at 87, App. at 36a. The decision of the arbitration committee is "final, binding, and conclusive." *Id.* at 88, App. at 37a. Both the courts and the Commission have held that the arbitration clause in section 11 imposes mandatory arbitration for determination of causation issues. *Walsh v. United States*, 723 F.2d 570, 574 (7th Cir. 1983); *Swartz v. Norfolk & Western Railway*, 589 F. Supp. 743, 746 (E.D. Mo. 1984); *Bell v. Western Maryland Railway*, 366 I.C.C. 64, 67 (1981).[32] While there is some disagreement as to whether the parties can together agree to waive the arbitration process,[33] the courts unanimously hold that each party has an absolute right to demand arbitration.

Mandatory arbitration of rail labor disputes originated with the Washington Job Protection Agreement in 1936, and the Commission has imposed mandatory arbitration in labor protective conditions since 1944. *Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 177,

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[32] The Commission first used the phrase "may be referred to arbitration" in § 8 of the *Oklahoma* conditions. *Oklahoma Railway Trustees Abandonment of Operation*, 257 I.C.C. 177, 200 (1944). Both the courts and the Commission have interpreted this language as providing for mandatory arbitration. *E.g., Walsh*, 723 F.2d at 574; *Batts v. Louisville & Nashville Railroad*, 316 F.2d 22, 26-27 (6th Cir. 1963); *McLaughlin v. Penn Central Transportation Co.*, 384 F. Supp. 179, 185 (S.D.N.Y. 1974); *Southern Railway—Control—Central of Georgia Railway*, 317 I.C.C. 557, 566 (1962), *modified*, 317 I.C.C. 729 (1963).

[33] *Compare Nemitz v. Norfolk & Western Railway*, 436 F.2d 841, 849 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), *and New Orleans & Northeastern Railroad v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963), *with Walsh*, 723 F.2d at 574, *and Chesapeake & Ohio Railway v. Ford*, 590 F.2d 557, 559 (4th Cir. 1979), *and Batts*, 316 F.2d at 26. Although the issue was briefed to this Court in the *Nemitz* case, the Court did not address the issue.

200 (1944). As the Commission explained, it imposed a mandatory arbitration requirement so that "those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions." *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975 (1977). In light of these arbitration provisions, the Commission has repeatedly recognized that it is without jurisdiction to determine individual causation issues. *See, e.g., Bell*, 366 I.C.C. at 67; *Leavens*, 348 I.C.C. at 979.

Similarly, in recognition of the importance of arbitration in the resolution of disputes over railroad employee protective conditions, courts throughout the nation have repeatedly held that they are without jurisdiction to decide the factual questions arising in such disputes.[34] Indeed, the courts have been particularly careful to avoid deciding the question of whether individual employees were "affected" by a merger or other transaction subject to protective conditions.[35]

In contrast, the court below has upset the carefully wrought structure of *New York Dock*. Even before the parties had an opportunity to request appointment of an

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[34] *Sorensen v. Chicago & North Western Transportation Co.*, 627 F.2d 136, 138 (8th Cir. 1980); *Held v. National Railroad Passenger Corp.*, 101 F.R.D. 420, 423-24 (D.D.C. 1984); *McLaughlin*, 384 F. Supp. at 183; *United Transportation Union v. Norfolk & Western Railway*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971); *Arnold v. Louisville & Nashville Railroad*, 180 F. Supp. 429, 434 (M.D. Tenn. 1960), *aff'd sub nom. Batts v. Louisville & Nashville Railroad*, 316 F.2d 22 (6th Cir. 1963); *see also Zapp v. United Transportation Union*, 727 F.2d 617, 625 (7th Cir. 1984); *Chesapeake & Ohio Railway v. Ford*, 590 F.2d 557, 559 (4th Cir. 1979); *Parsons v. Norfolk & Western Railway*, 442 F.2d 1075, 1078 (4th Cir. 1971); *O'Mara v. Erie Lackawanna Railroad*, 407 F.2d 674, 678 (2d Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970).

[35] *See, e.g., Walsh*, 723 F.2d at 575; *McLaughlin*, 384 F. Supp. at 185; *Arnold*, 180 F. Supp. at 435-36.

arbitrator, the court of appeals reached out to decide the question of causation on the basis of the fragmentary record before it. Moreover, the court decided that FTC employees *as a group* were affected by the merger when that decision is more properly made on an individual, case-by-case basis. *See Arnold*, 180 F. Supp. at 436. Such action clearly exceeded the Eighth Circuit's jurisdiction.

The court's jurisdictional excess, moreover, has serious consequences far beyond this particular case. This Court has emphasized the strong federal policy that favors arbitration of labor disputes when mandated by statute or agreement. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377-80 (1974). The reason for such policy is one of fundamental significance—the fact that courts simply are not equipped to deal with the extremely factual, industry-related issues involved in labor disputes. *Gateway Coal Co.*, 414 U.S. at 378; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). By brushing past the jurisdictional barriers and deciding in one terse sentence a complicated, multiparty causation issue, the court below has injected the judicial system into an area in which this Court has repeatedly held it does not belong. Its action was clearly improper and warrants prompt correction by this Court.

## III. THE COURT OF APPEALS' ALTERNATIVE HOLDING CONSTITUTES AN IMPERMISSIBLE EXERCISE OF AN ADMINISTRATIVE FUNCTION

The Eighth Circuit further concluded that, even if the employees of the motor carrier subsidiary were not "railroad employees" entitled by law to mandatory labor protective conditions, the Commission on this record abused its discretion in failing to grant them the same *New York Dock* conditions as the railroad employees. This in no way constitutes a permissible alternative basis

for the decision below. On the contrary, even apart from the suspect basis for the court's conclusion,[36] its prescription of the precise form of relief to be granted in a reopened proceeding constitutes an impermissible intrusion into the administrative domain.

It is a fundamental principle of administrative law that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus here, even if the court of appeals had properly concluded that the Commission abused its discretion in denying the petition to reopen,[37] the court should have simply ordered the Commission to correct its error by reopening the proceeding for further consideration in light of the principles laid down by the court. Instead, the court took upon itself the peremptory disposition of the very issue which should have been the whole subject of the reopening—the type of protective conditions, if any, which should be imposed for the benefit of employees of the motor carrier subsidiary.[38] The court's failure simply to remand, instructing the ICC

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[36] The Eighth Circuit, after reviewing isolated excerpts from the 8,000-page merger record, concluded that the motor carrier employees had been misled by "representations" of BN management as to the impact of the merger on employees. This conclusion is directly contrary to the Commission's finding that there was "no basis for concluding that BN misled petitioners or the Commission." *Reopening Denial* at 5, App. at 19a.

[37] This Court has stated repeatedly that administrative agencies should be required to reopen a proceeding only in "the most extraordinary circumstances." *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 296 (1974); *see also Northern Lines Merger Cases*, 396 U.S. 491, 520-21 (1970); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *ICC v. City of Jersey City*, 322 U.S. 503, 514-15, 519 (1944).

[38] As noted *supra* pp. 12-13 & n.24, there is no "standard" employee protective condition for motor carrier employees.

to decide this issue, was improper because "incompatible with the orderly function of the process of judicial review." *South Prairie Construction Co. v. Local No. 627*, 425 U.S. 800, 805-06 (1976) (summary reversal for failure to remand); *accord United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (summary reversal for failure to permit full consideration by ICC on remand); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-46 (1940); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

The Eighth Circuit's order here is particularly egregious in two respects. First, this Court has held repeatedly that reviewing courts must defer to the broad discretion of administrative agencies to fashion remedies. *See, e.g., NLRB v. Food Store Employees Union*, 417 U.S. 1, 9-10 (1974); *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115, 130-31 (1962); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-14 (1946). As this Court observed in *Food Store Employees:*

> [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

417 U.S. at 10.

Second, the Interstate Commerce Act explicitly makes the level of protection for motor carrier employees a matter for the discretion of the Commission, 49 U.S.C. § 11344(b)(2)(D) (1982), and provides that the Commission's authority shall be "exclusive." 49 U.S.C. § 11341(a) (1982). In almost half a century, the Commission has *never* imposed benefits for motor carrier employees at a level even approaching the generosity of *New*

*York Dock* conditions.[89] Thus the court below has compelled the exercise of a discretionary agency function in a manner which the agency quite clearly would never have chosen itself.

The proper role of a court which has concluded that the Commission erred in failing to impose employee protective conditions was clearly articulated by this Court in *ICC v. Railway Labor Executives Association*, 315 U.S. 373 (1942). There this Court, after holding that the ICC had erred in concluding it had no authority to impose employee protective conditions in railroad abandonment proceedings, concluded that the "nature and extent" of any conditions to be imposed were "questions for the Commission to decide in light of the evidence." *Id.* at 380. The Eighth Circuit's failure to follow this direction clearly requires prompt correction.

## CONCLUSION

For each of the foregoing reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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February 15, 1985

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[89] See discussion *supra* pp. 12-13 & n.24.